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No. 86-93

In the Supreme Court of the United States

OCTOBER TERM, 1986

CASSANDRA M. MENOKEN, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that she was wrongfully separated from the Community Services Administration when that agency was abolished by statute in 1981. The decision below is correct, it does not conflict with any decision of this Court or of any other court of appeals, and it presents no significant legal question. Accordingly, review by this Court is not warranted.

1. a. Prior to September 30, 1981, the Community Services Administration (CSA) was responsible for administering federal anti-poverty program grants to community agencies. The Omnibus Budget Reconcilation Act of 198[illegible] (OBRA), Pub. L. No. 97-35, 95 Stat. 357 *et seq.*, however, eliminated the CSA and created the Office of Community Services (OCS), a new agency within the Department of Health and Human Services (HHS), to administer the

block-grant program created by OBRA (Pet. App. A3, C3-C6). Unlike the CSA, which had more than 900 employees, the OCS had only 165 employees to carry out its functions (Pet. App. A4).

After OBRA was signed into law, the CSA notified its employees that all positions at the agency would be abolished, that no reassignments were available, and that all employees would be separated by September 30, 1981. Shortly before that date, however, the United States District Court for the District of Columbia ruled that, under the Veterans Preference Act, 5 U.S.C. 3502-3503, HHS was required to reassign CSA employees to the OCS insofar as the CSA's functions were transferred to that agency. *National Council of CSA Locals* v. *Schweiker*, 526 F. Supp. 861 (D.D.C. 1981). HHS then offered the 165 positions that existed in the newly created OCS to those former CSA employees with the highest retention standing based upon preference order master lists. HHS created these lists because the CSA had not maintained adequate personnel records, a fact that prevented HHS from reconstructing exact reduction-in-force priority registers for CSA employees (Pet. App. A4-A5, C7-C12).

Former CSA employees not selected under this procedure appealed to the MSPB, claiming that they were unlawfully separated from the CSA and that they were entitled to be reinstated with back pay to positions with the OCS until the OCS properly carried out its own reduction-in-force. The MSPB agreed that HHS had not followed correct procedures for determining which former CSA employees should be transferred to the OCS, but it concluded that this failure did not invalidate the entire reduction-in-force. Rather, the MSPB held that the appropriate remedy was to allow each former CSA employee to prove that he or she was entitled to a position with the OCS (Pet. App. D1-D43).

The former CSA employees appealed to the United States Court of Appeals for the Federal Circuit, which upheld the MSPB's decision. *Certain Former CSA Employees* v. *Department of Health and Human Services*, 762 F.2d 978 (1985) (Pet. App. C1-C41). The court of appeals agreed that HHS's use of the master retention lists was not in accordance with governing regulations, but it held that HHS nonetheless had afforded the former CSA employees all of the rights to which they were entitled under the Veterans Preference Act (Pet. App. C23-C24). The court concluded that any possible errors in the reassignment process could be corrected by the procedure that the MSPB had adopted: that is, to afford an opportunity to each former CSA employee, including petitioner, to show that he or she was entitled to an OCS position that had been erroneously assigned to another former CSA employee (*id.* at C30).

b. Petitioner was separated from her position as a GS-14 attorney-advisor with CSA when that agency was abolished on September 30, 1981 (Pet. App. B4). She appealed her separation to the MSPB, claiming that she was entitled to employment with the OCS (*id.* at A1-A2). The MSPB issued a decision sustaining petitioner's separation (*id.* at B1-B10). Petitioner appealed to the Federal Circuit, and her appeal was stayed pending that court's resolution of *Certain Former CSA Employees*, which involved common issues of law (*id.* at A8). After that case had been resolved, the court of appeals affirmed the MSPB's decision in the instant case, ruling that petitioner had not established that she was entitled to a position in the OCS (*id.* at A11-A18; 784 F.2d 365).

2. a. Petitioner reiterates her contention (Pet. 10-18) that she was entitled to one of several positions in OCS. That fact-bound claim does not warrant review by this Court. In any event, her claim was properly rejected by the court of appeals.

Petitioner was not entitled to compete for any of the three OCS attorney-advisor positions at the GS-15 level, because an employee is not entitled to be promoted during a reduction-in-force, such as this one (Pet. App. A13). *Mello* v. *Department of Energy*, 20 M.S.P.B.R. 45, 46-47 (1984). Thus, petitioner's argument (Pet. 15) that she was "qualified" for all the attorney-advisor positions at OCS is irrelevant with regard to positions above her GS-14 level, as the court of appeals found (Pet. App. A12-A13). Nor may petitioner argue (Pet. 15) that her former CSA position should have been classified at grade GS-15. As the court of appeals explained (Pet. App. A14), the MSPB necessarily had to rely on the civil service classifications in effect at the CSA when the reduction-in-force took place, since it would be nearly impossible to determine the retention rights of employees affected by a reduction-in-force if every employee's civil service classification had to be reexamined. Although there was one OCS attorney-advisor position at the GS-14 level, petitioner was not entitled to it, because it was awarded to another former CSA employee who had greater retention rights than petitioner (*id.* at A15).[1] The remaining OCS positions to which petitioner claims an entitlement were occupied by two Justice Department investigators detailed to the OCS. Petitioner was not entitled to compete for those positions because they were positions of record with the Department of Justice, not with the OCS. See 5 C.F.R. 351.404(a)(3).[2]

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[1]The person selected for the GS-14 slot was in a higher retention group and had an earlier service computation date than petitioner (Pet. App. A15).

[2]Petitioner clearly was not entitled to compete for any HHS position outside of the OCS. The parties stipulated, and the court of appeals found (Pet. App. A17), that the CSA's functions were transferred only to the OCS. The OCS therefore was the continuing competitive area in which petitioner could compete for retention. See 5 C.F.R. 351.302.

b. Petitioner errs in contending (Pet. 18-21) that the court of appeals' decision conflicts with *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959). As the Federal Circuit explained in *Certain Former CSA Employees*, "[t]he present case is far removed from *Vitarelli*" (Pet. App. C27). There, a single employee was discharged, on the ground that he was a security risk, in violation of the agency's procedures, and this Court held that he should be reinstated. 359 U.S. at 539-546. The instant case, by contrast, involved a reduction-in-force in which more than 900 former CSA employees sought reinstatement with a new agency that had only 165 positions to fill. Obviously, only a small percentage of CSA's employees could be employed by the OCS. Thus, unlike the situation in *Vitarelli*, most of the former CSA employees would have lost their positions regardless of how the reduction-in-force was carried out. For that reason, the remedy adopted by the MSPB—namely, to allow each former CSA employee to show that he or she was entitled to a position with the OCS, rather than to invalidate the entire reduction-in-force—was "a reasonable method of dealing with perhaps a unique and certainly a most unusual situation," a remedy that "fairly and appropriately adjusted and accommodated" the respective interests of the former CSA employees and the government (Pet. App. C35). Petitioner's argument in essence is that she and more than 700 other individuals whose jobs no longer existed should receive a back pay award from the Treasury for a five-year period during which they did no work and during which it was impossible for them to do any work. The court of appeals correctly rejected that argument.

It is therefore respectfully submitted that the petition for a writ of certiorari should be dénied.

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